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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Eleventh session

SUMMARY RECORD OF THE 45th MEETING

Held at the Palais des Nations, Geneva,
on Thursday, 1 December 1994, at 10 a.m.

Chairperson: Mr. ALSTON

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The meeting was called to order at 10.25 a.m.

ORGANIZATION OF WORK (agenda item 2) (continued)

1. The CHAIRPERSON said that since it would not be possible for a representative from Suriname to appear before the Committee, the latter would await the concluding observations which were to be drafted by Mrs. Bonoan-Dandan and then take up the report of Suriname (E/1990/5/Add.20) the following week, in closed session in accordance with its usual practice.

2. Mr. ALVAREZ VITA observed that even records drawn up under the 1503 procedure had found their way into the hands of the general public.

3. The CHAIRPERSON said that the distribution of confidential documents should be such that that did not occur.

Consideration of a draft optional protocol (continued) (E/C.12/1994/12)

4. The CHAIRPERSON asked the Committee how it wished to proceed with the question of the draft optional protocol. An expert meeting would be convened in Utrecht to pursue consideration of the subject, and a suggestion had been made to wait until after the Beijing World Conference on Women, as it was likely to endorse the idea of an optional protocol and even take a strong position on it, and that would be of benefit to the Committee. Thus, the Committee might want to delay the submission of its proposals to the Commission on Human Rights until its session of May 1995.

5. At the 44th meeting, he had proposed that the Commission should continue its discussion and that he should then draw up a revised version of his document that incorporated the comments of members. The new document would then be considered in May 1995, when final changes would be made before it was sent to the Commission. It might therefore be advisable simply to produce a background report for the February 1995 session of the Commission.

6. Mr. CEAUSU said that he agreed on the whole with that suggestion. Members of the Committee could make comments on the report and the draft optional protocol in document E/C.12/1994/12, following which Mr. Alston would revise his report and the draft optional protocol accordingly. In the report to the Commission, the Committee should underscore the fact that Mr. Alston had been mandated to prepare the draft optional protocol and that he had drafted a final version after hearing the comments of members. That would save time, because in any case the Committee would not be producing a final draft at the current session. Mr. Alston could then revise his report for the next session, which the Committee would approve and send to the Commission on Human Rights.

7. Mr. TEXIER wondered whether the Committee needed to present a finalized document to the next session of the Commission. In his view, it would be preferable to send a document to the Commission explaining the Committee's current position on the question and formulating its views on each of the articles and then to prepare a final report for the Commission at the Committee's session of May 1995. In that way, the Commission would have a

document for its February 1995 session and would know that the Committee had been working in fulfilment of the mandate entrusted to it at the Vienna World Conference on Human Rights.

8. Mr. SIMMA said that the Committee would hardly be able to complete the draft articles in time for the next session of the Commission. Moreover, any draft articles that were submitted to the Commission were likely to meet with stiff resistance. Therefore, the Committee should send the Commission a general report without final draft articles.

9. The CHAIRPERSON said that the Committee might appoint a working group to consider the question and continue the general reading while delegating the working group to produce specific provisions for the Committee's May 1995 session.

10. Mr. CEAUSU agreed with Mr. Texier on the need to produce a report in some form for the next session of the Commission. Mr. Simma's point was well taken that the Committee did not have time to complete its drafting of the optional protocol. As he saw it, the Committee should discuss the report and Mr. Alston could then revise it, drawing upon comments made, and send his revised version, which would still be only a draft, to the Commission. He was not opposed to the establishment of a working group, but thought that the Committee should discuss the report at its current session.

11. Miss TAYA said that it was not clear to her whether there was a time-limit for submitting the draft optional protocol to the Commission.

12. The CHAIRPERSON said that the Commission had asked the Committee to submit a document for the next session, but the Committee could postpone any such submission if it saw fit.

13. Mr. SIMMA said that as he understood it, the Vienna Declaration and Programme of Action had instructed the Committee to continue its work with the Commission. It would therefore be advisable, in accordance with that mandate, for the Committee to submit some form of report. If a working group was set up, it might cooperate with Mr. Alston on producing a document in time for the Commission's next session. An alternative might be to send the Commission a revised version of an analytical working paper while the Committee finalized the draft articles. He drew attention, however, to the danger of submitting draft articles that had not been sufficiently considered by the Committee.

14. Mr. KOUZNETSOV said that the Committee should hold its general reading of the report at its current session, which would be useful to Mr. Alston. The Committee could then inform the Commission that it was continuing its work on the optional protocol, but it should not send a raw draft to the Commission, which was not pressuring the Committee on that point. Thus, as the Committee had time for a general reading, it should return to the document, but without touching upon delicate issues, and note that disagreement existed on certain points requiring further consideration at the May 1995 session.

15. Mr. TEXIER said that the process of drafting an optional protocol was a lengthy one and he did not want the Committee to be blamed for any delays. In his opinion, the Committee's report to the Commission should state that a

working group had been established in May 1995 it would take account of progress made elsewhere, including in connection with the draft optional protocol to the Convention on the Rights of the Child and the Beijing World Conference on Women, and that it would present a draft optional protocol at a later date. The Chairperson or another member of the Committee might then make a short statement at the February 1995 session of the Commission to present the subject and explain the Committee's approach so as to encourage a debate in the Commission. It would be useful if some States gave their view on whether they considered an optional protocol important in the first place. An expression of support, or a lack thereof, would condition further work on the subject.

16. The CHAIRPERSON asked Mr. Texier whether he was suggesting that the Committee send his report, but without the articles, or a modified version reflecting the discussion to date.

17. Mr. TEXIER said that the Committee should report on its debate. He agreed with Mr. Simma that if it presented finalized articles, they might well meet with the resistance of States.

18. Mrs. JIMENEZ BUTRAGUEÑO asked when the Committee would have the alternative text offered on the previous day by Miss Taya.

19. The CHAIRPERSON said that as he understood it, that was a companion project which would not replace the protocol. Miss Taya's approach, which was most welcome, would not delay the draft.

20. Miss TAYA said that she could prepare her draft optional protocol by the beginning of the following week.

21. Mr. SIMMA supported Mr. Texier's proposal. A report could be prepared for the Commission that did not formulate specific draft articles, but merely reviewed the general points. The Committee could seek the reaction of States and then resume work on the draft articles at its May 1995 session.

22. Mr. ALVAREZ VITA said that he had understood that the Committee had begun to study the various articles of the draft optional protocol, whereas Mr. Simma had suggested a general debate. He had also understood that there was consensus that the Committee would submit to the Commission a document without articles. He asked for clarification as to the Committee's method of work.

23. The CHAIRPERSON said that the Committee had not ruled out returning to any issues but that Mr. Simma had suggested discussing particular proposals rather than a more general debate.

24. As to the Committee's method of work, the suggestion was that on the basis of the discussion at the present session a revised version of document E/C.12/1994/12 would be prepared, reflecting the Committee's views on specific issues and leaving out all references to drafting proposals.

25. Since the next session of the Commission began at the end of January 1995 and there would be no time for a revised version to be prepared at the present session, he took it that the Committee agreed to entrust him with responsibility for preparing the new text for submission to the Commission with a note stating that the Committee would welcome preliminary ideas from the Commission, that it would continue the discussion at its next session and report to the Commission as soon as possible.

26. It was so decided.

27. Mr. SIMMA considered that as the Economic and Social Council might well decide to cut down the number of its subsidiary bodies and to abolish the Committee, some provision on the lines of article 1, paragraph 2 was needed, otherwise there would be a lacuna in the text. States might well attack the proposal by pointing to such a lacuna. If a draft treaty referred to a body not established by that treaty itself, difficulties might arise. If the Committee were to be abolished, supervision of the optional protocol would be entrusted to a body that no longer existed.

28. Mr. ALVAREZ VITA said that he shared Mr. Simma's concern to a certain extent. A way had to be found to legalize the existence of the Committee, which would then acquire the status of a treaty body.

29. In paragraph VIII of the comments, dated 30 November 1994, of the American Association of Jurists (distributed in Spanish only), it was suggested that the Committee was the natural body to carry out the functions set out in the optional protocol. When that instrument entered into force the Committee would acquire a new legitimacy based on an international multilateral treaty. That suggestion might help to solve the problem.

30. Mr. KOUZNETSOV suggested that in a revised article 1, paragraph 2, mention should be made of the competence of the Economic and Social Council as the Committee's parent body, without making any assumptions as to the Council's action.

31. Mr. TEXIER said that since the Committee was not going to submit a written draft optional protocol to the Commission, it should not devote too much time to the wording at that stage.

32. Mr. SIMMA said that the wording of article 1, paragraph 2, as it stood, was a kind of invitation to remove the supervision of the optional protocol from the Committee. The drafting should therefore be improved, either by Mr. Alston or by an informal group.

33. Mr. CEAUSU suggested that article 1, paragraph 1, should be amended on the following lines: "A State party to the Convention that becomes a party to the present Protocol recognizes the competence of the Economic and Social Council, the Committee or any other designated body to receive and examine communications from any individuals ...".

34. Mr. MARCHAN ROMERO considered that merely deleting article 1, paragraph 2, would detract from the force of paragraph 1 and introduce a factor of uncertainty. He therefore suggested that paragraph 1 be reworded as

follows: "A State party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee granted by the Economic and Social Council to the Committee to receive and examine communications ...".

35. Mr. SIMMA observed that legally speaking Mr. Ceausu's suggestion was an elegant one but politically it might raise difficulties. States might well be able to accept an optional protocol providing for communications to be examined by an independent body of experts like the Committee, but not by the Council itself, a political body.

36. Mr. CEAUSU endorsed the suggestion that mention should be made in paragraph 1 of the fact that the Economic and Social Council had given the Committee certain powers with respect to the implementation of the Covenant. The second paragraph of the article could then be deleted.

37. The CHAIRPERSON said that the fact that a number of States agreed in a separate treaty that the Economic and Social Council had granted competence to the Committee would not bind the Council itself. Mr. Ceausu's suggestion might work if article 1, paragraph 2, were retained. A fall-back provision was needed stating in effect that if the Committee were to disappear an alternative approach was open to the Council.

38. Mr. MARCHAN ROMERO said that in his view there was no problem because, if a body were to disappear, the necessary substitution would be made.

39. Mr. SIMMA said that Mr. Marchan Romero's proposal did not solve the whole problem. The monitoring would have to be carried out by a group of experts whose composition was identical to that of the Committee on Economic, Social and Cultural Rights. Then it could be stated that in the case of a dissolution of that Committee, the States parties to the optional protocol would appoint some kind of successor body. The matter should not be placed in the hands of a politicized body such as the Economic and Social Council, since many members of the Council that were not parties to the optional protocol might decide to make it unattractive. Consequently, if the Committee were to be dissolved, any further action should be taken by the States parties to the protocol.

40. Mr. CEAUSU suggested that paragraph 2 should be amended to read: "For the purposes of this Protocol, the Economic and Social Council designates the Committee on Economic, Social and Cultural Rights to carry out the functions provided for in this Protocol. If in future the Economic and Social Council decides to designate another body, it shall consult the States parties to this Protocol".

41. Mr. MARCHAN ROMERO said that he was satisfied with Mr. Ceausu's suggestion. States considering the possibility of acceding to the Protocol would need to know in advance which body was responsible for monitoring it.

42. Mr. SIMMA observed that while Mr. Ceausu's suggestion was elegant, it created a small problem. The Committee, in a draft protocol, would be laying down a commitment for the Economic and Social Council by establishing an

obligation for it to consult with States parties. The Committee might not have the competence to do that. Approval by the Economic and Social Council would in any case be required.

43. Mr. ALVAREZ VITA pointed out that when considering article 1, the Committee should not overlook the third preambular paragraph.

44. The CHAIRPERSON said that Mr. Simma's comments were consistent with Mr. Ceausu's suggestion, on the assumption that the Economic and Social Council would have to give its approval in any case. He would prepare a revised paragraph 17 of his report, reflecting the Committee's discussion.

45. Mr. MARCHAN ROMERO said that article 2, paragraph 2, needed to be drafted in a more positive way so that States parties were required to facilitate, and not merely not to hinder, the effective exercise of the right to submit a communication. Mere passivity on the part of a Government could in fact serve as an impediment.

46. Mr. ALVAREZ VITA asked whether or not it would be desirable to specify what was meant by the word "group" in article 2, paragraph 1. The American Convention on Human Rights and the San Salvador Protocol allowed NGOs to submit communications. The San Salvador Protocol had been created 20 years after the International Covenant on Economic, Social and Cultural Rights. The Committee might therefore wish to consider the question as to whether legally constituted NGOs could be included within the meaning of the word "group".

47. Mr. SIMMA said that one very important aspect that should always be borne in mind was the need to make the optional protocol as attractive as possible. He wondered which of the existing procedures for considering communications provided for NGO participation and what their function in the process was. The San Salvador Protocol contained a clause allowing NGO participation, but that Protocol was apparently not very popular among members of the Organization of American States and was not enforced. One of the reasons for that might be that States were afraid that if the scope of potential applicants was enlarged beyond that of victims, a procedure for all kinds of abuse might be established. Restricting the scope to actual victims of violations would thus make the optional protocol more acceptable to potential States parties. The 1503 procedure used by the Sub-Commission on Prevention of Discrimination and Protection of Minorities permitted NGOs to submit communications, but the subsequent procedure was very different from any procedure that the Committee might adopt, which was likely to be closer to that followed in respect of the Optional Protocol to the International Covenant on Civil and Political Rights or to the treatment of individual communications under the European Convention on Human Rights.

48. Mr. ALVAREZ VITA said that he himself had queried much of the San Salvador Protocol but he considered that the possibility which it provided for NGOs to submit communications was a positive feature. Mr. Simma had been a major supporter of NGOs in the Committee and earlier in the current session he had stated that the Committee could do little without them, but he was now suggesting that States would not become parties to the Optional Protocol if NGOs were permitted to submit communications.

49. Mr. SIMMA explained that the role played by NGOs might be different in the case of civil and political rights, where the victim might have disappeared and therefore be unable to submit a communication. The situation of victims of violations of economic, social and cultural rights was easier. If NGOs were permitted to submit communications under the optional protocol to the Covenant on Economic, Social and Cultural Rights, nearly all the communications received might come from NGOs. The right occasion for NGOs to make their contributions was when the Committee considered reports submitted by States parties. He was, of course, in favour of the optional protocol, but the Committee must be cautious if it wanted States to ratify it.

50. The CHAIRPERSON informed the Committee that many NGOs had been disappointed to find that they would not be allowed to submit communications. When preparing his document, he had assumed that in most cases individuals would be assisted by NGOs.

51. Mr. MARCHAN ROMERO stressed the need for caution. Mr. Simma's argument seemed to be right if the optional protocol was to be ratified by the largest number of states. Ecuador, for instance, would have serious reservations about giving privileges to NGOs. He had a great admiration for NGOs, which provided first-hand information to the Committee, which in turn needed their support. However, to give them a special status would be legally and politically incorrect. They could be looked upon as pressure groups and should not be made new subjects of international law.

52. Mrs. JIMENEZ BUTRAGUEÑO agreed that it was not advisable to make a specific reference to NGOs.

53. Mr. TEXIER said that he agreed with Mr. Simma. A maximalist approach would not be apposite and would not encourage States to ratify the optional protocol. The contributions made by NGOs were indispensable for the consideration of reports submitted by States parties. The Committee had gone quite a long way in instituting discussions with NGOs and it had received many documents from them. In most cases victims of violations of the Covenant would be supported by NGOs, but NGOs should not be able to submit communications themselves. To include them in the scope of article 2 might cause difficulties for a number of States.

54. Mr. ALVAREZ VITA said that the Committee should be precise about what it meant by the word "group". He asked Mr. Alston for some guidance on that point.

55. The CHAIRPERSON, speaking as the author of the report, replied that the word "group" meant any group of individuals. In other words, communications could be submitted not only by single individuals, but also by groups of individuals claiming to be victims of some violation of the Covenant. That was more likely to occur in the case of economic, social and cultural rights, and complaints by groups of individuals were more likely to succeed. In using the word "group" there had been no intention of including NGOs, although an NGO such as a tenants' association could submit a communication identifying its members whose rights had been violated. The NGO would then be involved in the proceedings, but in the name of specified individuals.

56. Mr. ALVAREZ VITA said it was still not clear whether the text referred to individuals acting in their individual capacity, or to a group, which might be either a legal entity or a non-governmental organization.

57. The CHAIRPERSON said that the term "group" could not be taken out of context, as the text referred to "any individual or group claiming to be a victim of a violation". Amnesty International could not claim to be such a victim, but it could act on behalf of a group of individuals who so claimed. If, for example, a housing rights group was attacked by the Government, its members eliminated or its offices destroyed, in violation of its civil and political rights, such a group could then claim to be a victim.

58. Mr. GRISSA said he disagreed with Mr. Alvarez Vita, since a group could include a tribe, a trade union or people evicted from their homes. NGOs could not themselves claim to be victims, but he wondered if they could be designated by victims as their counsel.

59. Mr. ALVAREZ VITA asked if it would be clearer if the text referred to natural persons or individuals.

60. The CHAIRPERSON said that in the report, the reference would be extended to include a group of persons, although that might increase the concerns of some members of the Committee.

61. Mrs. JIMENEZ BUTRAGUEÑO suggested that the text read, "Any individual or group of individuals or persons".

62. The CHAIRPERSON said that the suggestion would be included in the narrative as an option. The Committee's report to the Commission on Human Rights would comprise a narrative and the discussion by the Committee at its present session rather than specific draft articles. The narrative would indicate where agreement had been reached on particular issues, and in that regard it would refer to an "individual or group of individuals or persons". The narrative would guide the Committee in the specific drafting of the text.

63. Mr. ALVAREZ VITA said that if the language was agreed upon, it should appear in the articles themselves and not in the narrative part of the report on the optional protocol.

64. The CHAIRPERSON said that the Committee was not drafting the optional protocol and would not at that time amend its draft formulations. Rather, it was conducting a general exchange of views on the issues raised by each article for inclusion in the Committee's report. The formal redrafting of the text would take place in May 1995.

65. Mr. MARCHAN ROMERO, moving on to draft article 3 said that in article 3, paragraph 2 of the Spanish version the word "inadmisible" should be replaced by "improcedente"; however, the use of "admisible" was acceptable in paragraph 3 of the proposed text.

66. The CHAIRPERSON asked how "improcedente" should be translated into English.

67. Mr. MARCHAN ROMERO said that what he meant was that the Committee could not prejudge whether something was inadmissible but must first receive it.

68. The CHAIRPERSON said that the Committee first received a complaint and could then consider it without having declared it admissible, but with a view to so declaring it. Paragraph 2 of the proposed text meant that the Committee would consider a communication but would declare it inadmissible under those particular circumstances.

69. Mr. SIMMA said that, in any event, the English text conformed entirely with that of the European Convention on Human Rights. The procedure was that the Committee would first sort out those anonymous communications or those which concerned a State which was not a party to the protocol. Secondly, it would conduct its examination and produce its findings on the admissibility or inadmissibility of the communication. The French translation of the heading of chapter 4, Receivability and admissibility, used the word "recevabilité", even though the word "inadmissibilité" also existed in French. He therefore wondered if the difference between the two terms could not be mirrored more faithfully in the French and Spanish translations.

70. Mr. TEXIER said that the French version was perfectly acceptable, as the terms "recevabilité" and "irrecevabilité" both had a precise juridical meaning. "Irrecevabilité" referred to something that could not be examined because it did not meet certain basic conditions; it was not just a question of vocabulary.

71. Mr. MARCHAN ROMERO said that if the Committee admitted a communication and then judged it to be anonymous, it could not be admissible. Rather, he suggested, "El Comité no procesará toda comunicación que no ...".

72. Mr. ALVAREZ VITA considered that while there were nuances of difference between "inadmisible" and "improcedente", the Spanish text could remain as it was. Perhaps another formulation would be, "El Comité no dará curso ...".

73. The CHAIRPERSON said there was some difficulty involved in changing the formulation, which was the accepted terminology in all the other Optional Protocols regarding the procedure for complaints. He agreed that it did not look logical, but the word "receive" was given a legal meaning which was different from its normal meaning of having something put in one's hand. Rather, it referred to the issuance of a formal receipt.

74. Mr. MARCHAN ROMERO said he agreed with that logic and that the word "inadmisible" was the juridical term.

75. Mr. SIMMA said that in accordance with the European Convention on Human Rights, if a communication were sent on to the European Court in Strasbourg, the first stage would be to examine its receivability. Only those communications which passed that test received a file number. The Committee should follow that example.

76. Mr. KOUZNETSOV drew attention to article 3, paragraph 3 (a); the word "unreasonable" was not a felicitous term, and the Russian translation did not correspond to it, but allowed too much room for a subjective approach.

The rule was that there was a need to exhaust all domestic legal remedies. The Committee should not be given the opportunity of assessing whether the application of that requirement was unreasonable, but if it decided that such remedies had not been exhausted, it could then consider receiving the communication in question.

77. The CHAIRPERSON said that the Optional Protocol to the International Covenant on Civil and Political Rights contained a different formulation, namely, that the Committee would not consider any communication from an individual unless it had ascertained, among other things, that the individual had exhausted all available domestic remedies, which would not be the rule where the applications of the remedies was unreasonably prolonged. That formulation concerned only the length of time but the jurisprudence of the Human Rights Committee had clearly gone beyond it. If the domestic legal remedy was available in principle but was in fact irrelevant, the Committee would then tell the State party that it was unreasonable to expect that it would be exhausted. An extreme example was when it was claimed that an appropriate domestic remedy would be an election to change the law, the Committee would decide that that was not an appropriate legal remedy. If, however, a high court said it would not deal with a certain range of issues, then the State could still argue that an individual had to petition the court and have his or her petition rejected, which the Committee would say was unreasonable under the circumstances. The narrative should reflect how open or flexible the Committee should be.

78. Mr. TEXIER asked for clarification on article 3, paragraph 2 (b), which stated that the Committee would declare a communication inadmissible if it constituted an abuse of the right to submit a communication. What constituted such an abuse?

79. The CHAIRPERSON said that that term was used in all the Optional Protocols. For example, if a communication formally met the criteria for admissibility but amounted only to a political diatribe or was submitted purely for political reasons, with no real desire for a decision by the Committee, the Committee could decide that it formally met the criteria but reject it none the less. However, that provision was not used very often and constituted a last resort.

The meeting rose at 1.05 p.m.